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File No. O. Civ. P. C./5

Legal DEPARTMENT
A BRANCH

Subject:—

Opinions under the code of civil Procedure 1908.

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File No. O. Civ. P. C./52.

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6/6.

Legal Department.

Under section 87B(1) of the Civil Procedure Code, read with section 86(1), no Ruler of any former Indian State may be sued in any Court except with the consent of the Central Government certified in ~~xkr~~ writing by a Secretary to that Government. Clauses (a) and (b) of section 87B respectively define the expressions "former Indian State" and "Ruler". As required by clause (a), the Central Government has already issued a notification specifying the former Indian States which includes Miraj (Senior). Under clause (b) of section 87B(2), the term "Ruler" in relation to a former Indian State means a person who, for the time being, is recognised by the President as the Ruler of that State for the purposes of the Constitution. The question for R.L.A's consideration is whether a separate notification of recognition by the President of the Ruler of Miraj is necessary.

In clause (22) of Article 366 of the Constitution, the term "Ruler" in relation to an Indian State is defined to mean the Prince, Chief or other person by whom any such covenant or agreement as is referred to in Article 291(1) was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler. The Rajasaheb of Miraj (Senior) entered into the covenant referred to in Article 291(1) before the commencement of the Constitution and the fact

that

that he has been guaranteed and assured the payment of privy purse under the said Article and is in receipt of the same implies that he is recognised by the President as the Ruler of Miraj for the purposes of the Constitution. Consequently, no separate notification about his recognition as Ruler of Miraj by the President appears to be necessary under section 87B(2)(b) of the Civil Procedure Code.

Sd. J.R.Dhurandhar 12/1
Additional Secretary to Government.

U.R.to P.& S.D.,No.469, dated the 14th January 1952.

MRP.
5/6/56.

Office of the R.L.A.

It appears that the Government of Bombay ~~is~~ in consultation with the Government of India has finally decided to take possession of the three villages which the Ruler of Idar had granted in favour of his wife, Her Highness the Maharani of Idar, before the merger of the State. Her Highness the Maharani of Idar has now served Government with a notice under section 80 of the Civil Procedure Code of a suit which she intends to file to restrain Government from taking possession of the three villages. She has made a request to Government to stay the execution of the order pending the expiry of the period of notice so that she might obtain a temporary injunction order from the civil court. P.& S.D. does not see any reason to stop the execution of the order. R.L.A. is requested to advise whether the view taken by the P.& S.D. is correct.

There is no law preventing Government from executing its order pending the expiry of the period of notice under section 80 of the Civil Procedure Code. Besides, it is apparent from the communication of the Government of India dated 28th May 1951 made to the Maharani Saheb of Idar that Government had decided to resume the three villages granted to her for maintenance by His Highness the Maharaja of Idar. It is, therefore, apparent that, if the Maharani Saheb of Idar wanted to challenge the order of resumption made

by Government

by Government, she had enough time at her disposal to give notice under section 80 of the Civil Procedure Code in time and to obtain an injunction order from the Civil court, which she did not do. Consequently, there appears no legal objection to Government directing the execution of its order of resumption of the three villages even before the expiry of the period of notice of suit.

Sd. P.M.Lad

Remembrancer of Legal Affairs.

U.R.to P.& S.D.,No.470, dated the 14th January 1952.

MRP.
5/6/56.

Office of the R.L.A.

Civil Procedure Code.
Section 70 - Rule 9 of the Rules under -

The view taken by the D.S., R.D., is correct. Rule 9 of the Rules framed by Government under section 70 of the Code of Civil Procedure is mandatory and an auction sale held in contravention thereof would be illegal and is likely to be set aside by the Court on an application by the judgment debtor under Order 21, rule 90.

Sd. P.M.Lad
20/3

Remembrancer of Legal Affairs.

U.R.to R.D.,No.4393, dated the 22nd March 1952.

MRP.
5/6/56.

R.I.No.6110,dt. 27-3-52.

On behalf of the Mahant of Dev Darbar in the Banas Kantha District, his advocate has made a representation to Government in the P. & S.D., requesting it to inform the High Court of Bombay under section 133 of the Code of Civil Procedure that the name of the Mahant be included in the list of persons exempted from personal appearance in Courts under its jurisdiction. In the aforesaid representation, it has been stated that by Government notification in the Political Department No. 8084 dated 26-10-1921 the Mahant was exempted from personal appearance in Civil Courts of the Palanpur Agency and this notification being still in force, the Mahant should be allowed to enjoy the privileges he was enjoying before.

On the said representation having been sent by P.& S.D. to H.D. for further action, H.D. thinks that the notification has no force after the merger of the Palanpur Agency in the State and so the statement made by the applicant that the notification is still in force is not correct. Papers have now been referred by H.D. to L.D. presumably to state whether the view taken by it is correct.

x x x x

Id.
14/4

D.S.(O) The H.D.office view is correct. The papers may be "seen and returned."

Id. E.P.B.
19/4

Addl. Secy.

Id. R.J.R.D.
19/4

A-to-A

MRP.
5/6/56.

U.R.to H.D.No.6126,dated 22-4-52.

OFFICE OF THE R.L.A.

As His Highness Sultan Sir Saleh-Bin-Ghalib Alkaity, Nawab Saif Nawaz Jung Bahadur, Ruler of the States of Shihr and Mukalla rasides beyond the limits fixed under rule 19 of Order XVI, a Commission will have to be issued by the Court. Such a Commission will be issued on an application made by the party to the suit for whose benefit the Commission is to be issued (see rules 5 and 15 of Order XXVI of Civil Procedure Code, 1908).

Sd. P.M.Lad
24/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.6460, dated the 26th April 1952.

MRP.
5/6/56.

Office of the R.L.A.

Civil Procedure Code. Sec.65

Rent claim by auction purchaser.

It is true that no sale certificate has been issued in the present case and it is also true that no stay order has been obtained from the appellate court as suggested by the Civil Judge, Poona. But on the sale being set aside on the ground of irregularity in publishing or conducting the sale, the auction purchaser has filed an appeal and in the event of his appeal succeeding, the auction purchaser would be entitled to the issue of a sale certificate, whereupon the property would be deemed to have vested in him from the time when the property was sold and not from the time when the sale would become absolute (see section 65 of the Civil Procedure Code). The vesting of the property is thus made to relate back to the date of sale and the auction purchaser is entitled to sue for profits from the date of the purchase (see Shamlal Vs. Sunderlal (1937) 171 Indian Cases 686). Consequently if the auction purchaser succeeds in the appeal, he would be entitled to claim rent from the date of the sale, i.e. 13-1-1951. In these circumstances, it appears that, pending the disposal of the appeal, it would not be advisable to pay the rent either to Shri Panse, the original owner of the premises or to Shri Dhekne, the auction purchaser.

Sd. P.M.Lad
11/7
Remembrancer of Legal Affairs.

U.R.to D.D.,No.11540, dated the 12th July 1952.

MRP.
5/6/56.

Office of the R.L.A.

Civil Procedure Code - Sections 47 & 54.

Partition by Cadastral Surveyor.

It appears that a decree for partition in Special Reg. Suit No.166 of 1948 was forwarded by the Civil Judge, S.D., Dhulia for execution to the Collector of Dhulia. The Collector forwarded it to the District Inspector, Land Records for effecting a partition in terms of the decree and in accordance with the Departmental Rules, the District Inspector got the partition done through the Cadastral Surveyor and after satisfying himself that the partition proposed by the Cadastral Surveyor was proper and equitable submitted the papers to the Collector for approval. The final order of partition was passed by the Collector and the decree-holder was placed in possession. Thereafter the judgment-debtor appears to have made an application to the Court under section 47 of the Civil Procedure Code objecting to the partition on the ground that the partition effected by the Cadastral Surveyor was ~~xx~~ ultra ~~xxx~~ vires. The Civil Judge accepted that contention and has directed the Collector to re-partition the property. The question raised for R.L.A's consideration is whether the view taken by the Civil Judge is correct.

2. Under section 54 of the Civil Procedure Code the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in

being in force relating to the partition or the separate possession of shares of such estates. It appears that certain rules have been framed by Government for the guidance of officer in respect of partition of the estates. These rules are no doubt in the nature of instructions and have no statutory force. However, what is required to be done by the Cadastral Surveyor under these rules is that he should give a notice to the parties and if the parties are present, he should partition the land (1) according to the Court's direction in the decree or (2) in the way the parties agree among themselves to have the property divided. But if the parties are absent after due notice he should partition the property equitably in accordance with the court's instructions with the help of the Panchas. Rule 9 provides that after completion of the measurement work, he should submit the case within a week to the District Inspector of Land Records, with the following papers:-

(1) Plane table sheet with three copies etc.

(2) Hissa Form No.4 showing Hissewar area.

(3) Watap Takta in Form A.

(4) All auxiliary papers such as notices, orders to Village Officers, etc.

Under Rule 10 the District Inspector of Land Records will on receipt of the papers from the Cadastral Surveyor scrutinize the proposed partition, verify the calculation work submitted by the Cadastral Surveyor and if the work is found properly and ~~x~~ equitably done, forward the case to the Collector ~~x~~ for approval of the partition made and the Watap Takta or partition statement will then be scrutinized in the Collector's office. It

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is clear from these rules that what the Cadastral Surveyor actually does is to propose partition of the estate and it is for the District Inspector to scrutinize the proposed partition and to see that the work is done properly and equitably. The Civil Judge, S.D. considers that the work done by the Cadastral Surveyor is in itself a partition of the estate and as such it is ultra vires of section 54 of the Civil Procedure Code inasmuch as he is not a gazetted officer. This view of the Civil Judge is obviously wrong. "A statute which requires something to be done by a person would, except in cases subject to the principle that delegatus non potest delegare, be complied with, in general, if the thing were done by another on his behalf and by his authority, for it would be presumed that there was no intention to prevent the application of the general principle of law that qui facit per alium facit per se unless there was a something in either the language or the object of the status which showed that a personal act was intended." (See Maxwell on the Interpretation of Statutes p.66). It cannot be expected of the Collector or any gazetted officer charged with the duty of partitioning the estate to go personally to the estate and effect partition by actual measurements. The spade work such as actual measurement and preparing Watap Hissa must obviously be got done by a subordinate officer

and so

and so long as such work is properly scrutinized and approved by the officer charged with the duty of partitioning it would be deemed to have been done by such officer. Otherwise it would be impossible to carry on the administration if such details are required to be personally attended to and discharged by the officer. In these circumstances, the view taken by the Civil Judge, S.D. is clearly wrong. Since, however, the parties have submitted to the decision of the Civil Judge, the proper course would be to re-partition the lands as directed by the Civil Judge, S.D. and in case a similar point is raised by any court again, opportunity should be taken to contest the view by asking the District Government Pleader, Dhulia, to argue the point.

Sd. P.M.Lad
24/7
Remembrancer of Legal Affairs.

U.R.to R.D.,No.12256, dated the 25th July 1952.

MRP.
5/6/56.

Office of the R.L.A.

Civil Procedure Code, Sections 47 and 54.

Under section 54 of the Civil Procedure Code, the execution of the decree is placed entirely in the hands of the Collector. But if the Collector contravenes the decretal command of the Court, or transgresses the law for the time being in force relating to partition, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution. In such a case the aggrieved party should proceed by an application under section 47 and not by a separate suit (see Krishnaji v. Damodar 5 Bom.L.R. 648). In the present case it appears that the Collector has partitioned all the lands between the parties in terms of the decree except two survey numbers, one of which cannot be partitioned as it would be in contravention of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act. The parties it appears are also given possession of these lands constructively through the tenants. Revenue Department appears to be of the view that as the partition of all the lands could not be done by the Collector, the partition in respect of the lands already effected would not also be lawful. This view of Revenue Department does not appear to be correct. The lands have to be partitioned equitably. Whatever partition could be effected of the survey numbers has been done by the Collector and it appears that it is not disputed by the parties that the partition of these lands is in any way

unreasonable

unreasonable or inequitable. Besides, it would be competent for the parties to challenge the partition in the civil court. In the circumstances, it appears that it would be proper if the Collector is advised to report all the facts to the Civil Court and seek its directions even in respect of the lands which cannot be partitioned on account of the difficulties created by the Bombay Prevention of Fragmentation and nsolidation of Holdings Act.

Sd. P.M.Lad
14/8
Remembrancer of Legal Affairs.

U.R.to R.D.,No.13331, dated the 14th August 1952.

MRP.
5/6/56.

Office of the R.L.A.

It is true that the Civil Judge in his letter dated 9th July 1951 has made a reference to Order 21, Rule 52, Civil Procedure Code, but it is not clear from his letter in what connection he has made that recital. At any rate, his letter does not indicate that any order under Order 21, Rule 52 of the Civil Procedure Code has been issued. In the present case a receiver has been appointed under Order 40, Rule 1 of the Civil Procedure Code and the receiver so appointed is an officer or representative of the Court and subject to its orders. But the receiver cannot proceed to recover the amount from the District Agricultural Officer directly without filing a civil suit with the permission of the Court. Nor can the Court issue any order for payment of the amount save in execution of any decree obtained by the receiver. If the receiver has to recover the amount, he will have to file a civil suit. But it appears that no set off can be claimed by Government in respect of the cost of supplies made to Shri Bhokare. Consequently, the resistance of the claim by the receiver for payment of Rs.1,311-3-0, the price of jowar purchased by Government, would serve no purpose and if the receiver is forced to file a suit, Government will have to pay the amount with costs. In the circumstances, the proper course appears to be to pay the amount of Rs.1,311-3-0 to the receiver and to file a suit for the recovery of Rs.1,245-4-0 and this suit may be filed against Shri Bhokare and the Local Board and the Receiver may be joined as parties.

Sd. P.K.Lad
30/3
Remembrancer of Legal Affairs.

U.R.to A.& F.D.,No.14313, dated the 3rd September 1952.

MRP.
5/6/56.

Office of the R.L.A.

The whole of ths house was mortgaged and the Court had right to bring to sale the whole house or any part of it. The Court had put to sale only the Eastern half of the house and the same specific portion has been purchased by the highest bidder in the auction. The purchaser is therefore entitled to be put in possession of that share. No separate direction for partition was necessary. There is therefore no substance in the contention raised by Shantappa.

Sd.

For Remembrancer of Legal Affairs.

U.R.to R.D.,No.20640/A, dated the 9th December 1952.

MRP.
5/6/56.